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IN THE

Supreme Court of the United States

October Term, 1969.

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No. **1105**

ABC AIR FREIGHT COMPANY, INC.; ADD AIRFREIGHT CORPORATION; AIRBORNE FREIGHT CORPORATION; AIR-LAND FREIGHT CONSOLIDATORS, INC.; AIR-SEA FORWARDERS, INC.; AIRWAYS AIRFREIGHT; BARNETT AIR CARGO, INC.; PETER A. BERNACKI, INC.; HENSEL, BRUCKMANN & LORBACHER, INC.; INTERNATIONAL CUSTOMS SERVICE, INC.; H. G. OLLENDORFF, INC.; PANALPINA AIRFREIGHT, INC.; WTC AIR FREIGHT, and AIR FREIGHT FORWARDERS ASSOCIATION,

Petitioners,

against

CIVIL AERONAUTICS BOARD

and

CF AIR FREIGHT, INC.; CONSOLIDATED FREIGHTWAYS, INC.; P.I.E. AIR FREIGHT FORWARDING, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; NAVAJO FREIGHT LINES, INC.; YELLOW FREIGHT SYSTEM, INC.; GLOBAL AIR CARGO, LTD.; GATEWAY TRANSPORTATION CO., INC., and GATEWAY AVIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 24, 1969.

OPINIONS BELOW

The opinion of the Court below of which review is sought appears in the Appendix hereto (A. 1).[1] It is not yet reported. The earlier opinions delivered by the Court and respondent Civil Aeronautics Board (Board) are as follows: Opinion and Order on Remand of the Board dated April 21, 1969, not yet officially reported, but unofficially reported as C.A.B. Order 69-4-100, Docket 16857 (A. 15) and "Proposed" Regulations PSDR-22 and EDR-159, Docket 20926 (A. 68); Opinion of the Court of Appeals dated March 13, 1968, reported at 391 F.2d 295 (A. 91),[2] and Opinion and Order of the Board dated September 22, 1967, not yet officially reported, but unofficially reported as C.A.B. Order E-25725 Docket 16857 (A. 117).

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Second Circuit on October 24, 1969. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court's decision allowing the Board to authorize long-haul motor carriers as air freight

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[1] Citations to the Appendix are prefixed "A." throughout this document.

[2] Citations to the Court's first Opinion are to the official Report. For additional reference, the page numbers of the official Report have been indicated in the copy of the Opinion reproduced in the Appendix hereto.

forwarders violated Congressional policy as evidenced in the Federal Aviation Act of 1958 and elsewhere.

2. Whether the Court below deprived petitioners of their rights to judicial review of the Board's Order and Regulations, contrary to 49 U.S.C. §1486.

3. Whether the Court's decision violated the Administrative Procedure Act, 5 U.S.C. §557(c), by allowing the Board to substitute a so-called "experiment" for the findings, conclusions and reasons required by the Act, or otherwise.

APPLICABLE STATUTES AND REGULATIONS

Federal Aviation Act of 1958.

§101(3), 72 Stat. 737, as amended, 49 U.S.C. §1301(3) (1964) (A. 202).[3]

§102, 72 Stat. 740, 49 U.S.C. §1302 (1964) (A. 202).

§408(a)(5), 83 Stat. 103 (1969), Pub. L. No. 91-62, §2 (Aug. 20, 1969), amending 49 U.S.C. §1378(a)(5) (1964) (A. 203).

§408(b), 72 Stat. 767, as amended, 49 U.S.C. §1378(b) (1964) (A. 204).

§1006(a), 72 Stat. 795, 49 U.S.C. §1486(a) (1964) (A. 205).

Economic Regulations of the Civil Aeronautics Board.

§296.43, 14 C.F.R. §296.43 (1969) (A. 206).

§296.86, 34 Fed. Reg. 19342 (1969) (originally promulgated with the Order here under review on April 21, 1969) (A. 207).

§297.34, 14 C.F.R. §297.34, (1969) (A. 208).

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[3] Because of their length the applicable statutes and regulations are set forth in the Appendix.

§297.66, 34 Fed. Reg. 19343 (1969) (originally promulgated with the Order here under review on April 21, 1969) (A. 210).

Administrative Procedure Act.

§2(e), 80 Stat. 388 (1966), 5 U.S.C. §558(c) (Supp. IV, 1969) (A. 211).

§8(b), 80 Stat. 387 (1966), 5 U.S.C. §557(c) (Supp. IV, 1969) (A. 212).

STATEMENT OF THE CASE

This proceeding was instituted by the Board on January 12, 1966 as a "comprehensive" investigation "to fully explore the possible consequences of allowing motor carriers, such as applicants, to be air freight forwarders * * *" (J.A. 11).[4] The Examiner in his initial decision confirmed the broad nature of the investigation when he stated that, while the immediate issue was whether the [then] four applicants should be authorized, the "fundamental" question was whether "long-haul motor carriers of general commodities should be allowed to act as air freight forwarders" (J.A. 748).

Prior to the decision in this case and throughout the more than twenty year history of the air freight forwarding industry, the Board had allowed no long-haul motor

[4] The record herein includes the printed appendices in both No. 31,795 and 33,623 in the Court of Appeals, the former being the assigned docket number prior to remand. The printed Appendix in No. 31,795 was designated "Joint Appendix" and is prefixed "J.A." herein, while that in No. 33,623 was designated "Appendix" and is prefixed "App." The record also includes a Joint Appendix in No. 31,795 that was not printed but instead consists of photo copies of the original record. Since those pages bear only the original record numbers, that part of the record is prefixed "J.A.(R.)."

carrier to become an air freight forwarder.[5] The Board had acted pursuant to a rigid, exclusionary policy, under which air transportation, including *air freight forwarding*, was to be "free of control by surface carriers." *Railway Express, Air Freight Forwarder Application*, 27 C.A.B. 500, 502 (1958). This policy was not a mere creature of the Board but, instead, was described as a "fundamental concept" which "*Section 408 reflects*" and which is "*in accord with congressional intent.*" (*Ibid.*) (emphasis added)

The justification for the Congressional policy is nowhere better illustrated than in this case. The air freight forwarders and long-haul motor carriers are substantial competitors. Many shipments handled by the forwarders move also in motor carriage and vice versa. (While air rates are concededly higher on the average, air offers a distinct advantage in terms of speed.) Competition between the two modes is increasing, as motor carrier costs rise in relation to the costs of providing air freight service, and as the rate differential between the two modes narrows.[6] In fact, with the railroads

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[5] The Board's only citation to a case where a long-haul motor carrier was allegedly awarded authority was to United Parcel Managers Co., Order E-7324, April 22, 1953 (A. 122). However, the Court below properly dismissed that case as having been accorded no significant precedential value, since that carrier's authority by and large was and is restricted to parcels of 50 pounds or less (391 F.2d at 301, n. 7). Hence, *the Board, until now, has never awarded air freight forwarder authority to a long-haul motor carrier with unrestricted general commodity authority* or even intimated that it would do so.

[6] The Board found that as a result air competition will capture more and more surface freight (A. 25-26).

now virtually out of the passenger business, and with the air freight forwarders becoming the major carriers of air freight (see p. 10, *infra*), there is now no greater area of regulated air-surface competition than that which exists between the air freight forwarders and the long-haul motor carriers.

Notwithstanding this intensification of competition between the air freight forwarders and the long-haul motor carriers, the Board decided to admit the nation's *largest* long-haul motor carriers into air freight forwarding (Order E-25725, A. 117). The Court, however, on review, vacated the awards and remanded the case to the Board, concluding that the Board's findings in support of entry of long-haul truckers as a class were wanting in the careful investigation, substantial evidence, and rational explication required by law, particularly in view of the fact that the Board's proposed action (1) was "fraught with danger" insofar as impact on the existing industry was concerned (391 F.2d at 307), (2) constituted a total reversal of policy from that previously adhered to over the course of many years (*id.*, at 301), and (3) was opposed to a "general policy Congress has long decreed" (*id.*, at 307).

On remand, the Board, after receiving briefs and hearing oral argument, but without further hearing and, indeed, without reopening the record, reached basically the same result as the first time (Order 69-4-100, A. 15). At the same time, the Board *rejected* the Court's conclusion that it must follow Congressional policy as found by the Court (A. 18). Perhaps for that reason, the major differences in the Board's second opinion were more of form than of substance, that is, the long-haul motor carrier applicants other than those parties to the proceeding were now to be screened through "proposed" regulations which were issued simultaneously with the decision (A. 68). The criteria for admission were to be

identical, however, to the criteria employed in the case of the first three (A. 44). The Board nevertheless stated that hereafter the policy was to be one of "monitored" entry under the regulations (A. 18).

Vice Chairman Murphy, who dissented from the original decision, again dissented on the grounds, *inter alia*, that the Board's Order was non-responsive to the Court's mandate (A. 49).

The Court of Appeals in its second Opinion affirmed the Board's Order on Remand (A. 1).[7] It admitted, however, that the Board had failed to consider the applicable Congressional policy (A. 10) and also acknowledged that the Board had failed to deal with other directives of the Court upon Remand (A. 6). The Court significantly made *no* determination whether the Board had complied with Section 8(b) of the Administrative Procedure Act. (Compare 391 F.2d at 298 and 307). Finally, the Court abandoned its earlier requirement that the Board articulate its rules in terms of the impact of the probable entrants on the existing independent air freight forwarding industry (*id.*, at 298 and 300), the Court holding instead that the "proposed" rules, through which other applicants were to be screened under the monitored "experiment," did not yet affect petitioners and, therefore, were not subject to review (A. 12). As will be evidenced hereafter, the Court's decision is highly prejudicial to petitioners and not in accord with law.

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[7] Jurisdiction in the Court of Appeals was based on Section 1006(a) of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. §1486(a) (1964).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. The Decision Below Sanctioned An Important And Basic Change In The National Transportation System.

Air freight forwarding is a dynamic and rapidly growing segment of the nation's transportation system. Air transportation generally is the growth leader among transportation modes, and within air transportation, air freight is growing faster than passenger traffic.[8] And, as will be demonstrated below, the air freight business of the forwarders is growing more rapidly than that of the direct air carriers.

The air forwarder is a common carrier. As such, he assumes total responsibility for his customers' shipments from origin to destination. Since air freight forwarders do not operate aircraft, his services necessarily consist of promoting, selling, routing and handling air freight, document preparation, and movement of air freight on the ground at origin and destination, as well as at interline points. The forwarder's customer normally is not aware of the identity of the underlying direct air carrier utilized for his shipment. The forwarder often acts as a transportation advisor, thereby preventing the shipper from making costly distribution errors. (See generally J.A. 729-30; 391 F.2d at 304.)

The dramatic growth in the volume of revenues (but not earnings) in the *air* freight forwarding industry is attributable in large part to the nature of the air freight market and the functions the forwarder performs. Air

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[8] A. 50; 1968 C.A.B. Ann. Rep. 139.

freight traffic is theoretically capable of moving from the door of the consignor to the door of the consignee at nearly the speed of sound. In fact, however, the door-to-door time is considerably slower. The reason is that the traffic consists of relatively small shipments (as opposed to bulk shipments), and each shipment must be handled, moved on the ground, documented and consolidated for line-haul movement. The dramatically increased efficiencies in the line-haul movement of air freight brought about by new and better aircraft has required the industry to keep pace on the ground in order that the inherent advantages of air transportation not be lost. As the figures indicate, the forwarders, whose expertise lies in these areas of increasing need, have risen to the occasion and have met these needs with marked success.[9]

The forwarder receives compensation for his services, in part, from being able to consolidate smaller shipments into larger ones, which then move at the lower volume unit rates of the direct air carriers, the rate structures of the latter reflecting reduced unit costs for large shipments (J.A. 730).

In 1965, the year of record in this proceeding, the air freight forwarding industry generated commercial revenues of $164 million, or 37% of total air freight services sold to the public, against 63% for the direct air carriers.[10] In 1968, the volume of forwarding

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[9] In contrast, the *surface* forwarder operates in a more limited segment of the total market and has fewer opportunities. *Air Freight Forwarder Case,* 9 C.A.B. 473, 517-18 (1948).

[10] These figures are taken from the following reports required to be filed with the Board, of which official notice may be taken under Rule 24(m) of the Board's Rules of Practice: Forms 244

(cont'd)

revenues had risen to $298 million – nearly double 1965 – and its share of the total market climbed to 42% compared with 58% for the direct carriers. Commercial air freight revenues for the industry in 1968 totalled more than $700 million. It is thus apparent that what is involved in this decision today is close to a billion-dollar industry, in which the independent air freight forwarders are substantial contributors and imminently may well be the major contributors.

On the basis of the foregoing figures, and given the rate of technological growth in air transportation throughout the years, it has frequently been predicted that in the not too distant future, freight revenues will exceed passenger revenues in air transportation. *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624, 637 (D. C. Cir.), *cert. denied*, 385 U.S. 843 (1966) (dissenting Opinion of Judge Burger). Compare 1968 C.A.B. Ann. Rep. 139.

As noted earlier, the Board's Order affirmed by the Court would, for the first time, allow the nation's largest motor carriers as a class to become air freight forwarders. The invasion would be large scale. Already, a total of sixteen such carriers have been admitted or have filed applications and are waiting in the wings to enter (A. 44). More will surely follow if for no other than competitive reasons (391 F.2d at 300). Under the announced standards most if not all future

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(Footnote 10 continued)

(filed by air freight forwarders); Handbook of Airline Statistics, Part II, Table 83 (1967 ed.) (summarizing the direct air carrier data). The reported figures of the direct air carriers have been adjusted to eliminate revenues not received from the shipping public, *i.e.*, forwarder payments.

applicants will be admitted, since there will be no basis for distinguishing the latter from those already admitted.

As a result of the Court's decision, the shipping public stands to lose the *substantial* benefits of long-haul motor carrier/air freight forwarder competition, which Congress has taken such pains to preserve (see Point II, *infra*). The choice of mode for the shipper's goods – which any carrier operating competing modes could strongly influence through its sales efforts, service and position as transportation advisor – will be made in this instance on the basis of carrier profitability. And because of the substantial fixed investment of the truckers in their motor carrier operations in comparison to air,[11] the major incentives of these applicants will be to promote surface transport at the expense of air, in direct violation of Section 102 of the Act. *Application of ABCO Moving & Storage Corp. et al.*, Order E-16474, March 3, 1961, C.A.B. Docket No. 12193, p. 4 (mimeo.); *Air Freight Forwarder Case*, 9 C.A.B. 473, 510 (1948); *Latin American Air Service*, 6 C.A.B. 857, 903-04 (1946).

In addition, the entry of the motor carriers can be expected to adversely affect the "highly vulnerable" existing air freight forwarders. Ninety percent of the forwarders collectively suffered a loss of $1.1 million in 1965 (391 F.2d at 299). Such entry under the circumstances would thus be in derogation of the Court's finding that "the continued health of the independent forwarders is of utmost importance not only

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[11] In 1965, the applicants' collective investment in long-haul motor vehicles alone approximated $157 million dollars, before considering any other fixed investments incidental to applicants' long-haul motor carrier business (J.A.(R.) 1892, 2524, 3076 and 3086). Against that massive figure applicants propose to invest only a total of $1 million in air freight forwarding facilities (J.A. (R.) 1904, 2596-2600 and 3046).

to themselves but to the future of air freight" (*id.*, at 300).[12] Of course, competition would be further eliminated to the the extent present independent forwarders are driven from the industry.

These undesirable competitive effects are being sanctioned apparently in the name of intermodal coordination (see the discussion of the Examiner at A. 162 which was adopted by the Board at A. 18). While that concept is presently much in vogue, Congress has yet to legislate in the area.[13]

In short, what is involved in this case is a basic change in the national transportation system which will adversely affect competition by eliminating the Congressional policy against entry of surface carriers into air transportation in an area where it is most effective. While such change might properly be the subject of legislative concern, it is beyond the power of the Board to enact under existing statutes.

[12] On remand, but without reopening the record, the Board simply abandoned its earlier finding that entry of the motor carriers would hasten the demise of a number of air freight forwarders (A. 39 and 121). It also ignored *for the purpose of determining competitive impact*, the substantial *total* financial resources of the applicants, denying that such resources would give applicants a substantial competitive advantage over petitioners (A. 38-39). But as the Board noted elsewhere, such *total* resources would be available to the applicants (A. 27), and the seriousness of the threat to the forwarders is indicated by the fact that the operating revenues of just the three applicants *already admitted exceed* those of the *entire* air freight forwarding industry (J.A.(R.) 2892).

[13] Point II, *infra*. The Act creating the Department of Transportation left the various economic regulatory functions of the independent administrative agencies intact and did not change any substantive economic regulatory law in the transportation field. Department of Transportation Act, 80 Stat. 931 (1966), 49 U.S.C. §1651, *et seq.* (Supp. IV, 1969).

II. The Court Below Interpreted The Federal Aviation Act In A Manner Contrary To Congressional Intent And Long-Standing Administrative Construction.

This case involves the power of the Board under the Act to reverse a long-established course of action (391 F.2d at 301 and 302) in a direction not only fraught with danger but also clearly in opposition to Congressional intent (*id.*, at 307).

The Board has generally licensed air freight forwarders under the broad public interest standards contained in Sections 101(3) and 102 of the Federal Aviation Act of 1958, respectively 49 U.S.C. §§1301(3) and 1302 (1964), and Regulations issued pursuant thereto, §§296.43 and 297.34 of the Board's Economic Regulations. In addition to those standards, Section 408(a)(5) of the Act, 49 U.S.C. §1378(a)(5) (1964), as recently amended by Pub. L. No. 91-62, §2 (Aug. 20, 1969) in respects not here material, proscribes the acquisition of air freight forwarders by other common carriers, unless the Board finds under Section 408(b), 49 U.S.C. §1378(b) (1964), that such transactions are in the public interest and do not tend to restrain trade or create a monopoly.

Beyond those very broad standards, however, the statutes contain some very pointed language which relates to the matter at hand. Subsection (b) of Section 408 of the Act further provides that, while the Board, under certain circumstances, may approve acquisitions of control by common carriers of air carriers:

> " * * * if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of Section 5(8) of the Interstate Commerce

> Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition."

The long-haul motor carriers clearly fall within the purview of the above-quoted statute, which has been held to constitute virtually an absolute bar to the entry of any surface common carrier into air transportation as a direct air carrier. *American President Lines, et al., Petition*, 7 C.A.B. 799 (1947). But because of the reference to the use of "aircraft to public advantage in [applicant's] operation" in the second proviso of Section 408(b), and the fact that air freight forwarders are expressly prohibited by *Board* Regulations (14 C.F.R. §§296.1(a)(1) and 297.1(a)) from operating aircraft directly, the Board has uniformly held the second proviso to be non-applicable *literally* to an acquisition of an air freight forwarder.[14]

However, *notwithstanding that holding*, the Board for over twenty years at the same time applied a *rigid policy of exclusion* against surface carrier invasion of *air freight forwarding*. Thus, in the *Railway Express Case, supra*, p. 5,

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[14] *American Airlines, Inc. v. C.A.B.*, 178 F.2d 903, 909-10 (7th Cir. 1949). It should be noted, however, that the Board's decision in this matter was not unanimous, member Jones in a dissenting opinion having concluded otherwise (9 C.A.B. 524).

which involved the application of a railroad-controlled company for air freight forwarding authority, the Board concluded:

> "Section 408 reflects the established general policy that our air transportation system shall be free of control by surface carriers. This fundamental concept cannot be ignored. * * * Rigid limitation of other forms of transportation in the Nation's air transportation system is in accord with congressional intent and is necessary for a soundly developed system." (27 C.A.B. at 502.)

See also the Board's Opinion in the *Air Freight Forwarder Case, supra,* 9 C.A.B. at 502.

Judge Friendly confirmed the existence of this statutory policy behind the second proviso of Section 408(b) prohibiting entry by surface carriers into air freight forwarding in his first opinion, setting forth at length the various manifestations of the policy, and noting that it was not wholly agency determined, but, instead, was a "radiation" from Congress.[15] While recognizing expressly that the second proviso of Section 408(b) did not *literally* apply to the acquisition of indirect air carriers, he concluded that the Board nevertheless:

> "is necessarily obliged to consider the policies behind the proviso in regulating entry into *forwarding*." (391 F.2d at 302) (emphasis added.)

In response to this clear mandate of the Court, the Board, incredibly, stated on remand:

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[15] 391 F.2d at 302-03.

> "At the outset, the Board rejects the contention that the second proviso of Section 408(b) reflects a Congressional policy against surface carrier participation in the air forwarding business." (A. 18.)

It was beyond the power of the Board thus to reject and to refuse to consider the applicable Congressional policy.[16] The Board is required to formulate policy within the four corners of the statute. As the Board itself recognizes:

> "It is not the function of an administrative body to create basic policy but to administer that which Congress has prescribed." (*American President Lines, supra*, 7 C.A.B. at 800)

And as one noted commentator has stated:

> "On ordinary problems of interpreting statutes, except when the subject matter is technical and nonlegal, the courts are the specialists, whether analysis of legislative history is called for, or whether the main process is one of finding the meaning of the words." (4 Davis, *Administrative Law Treatise* 242 (1958.)

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[16] Judge Friendly, in two classic understatements, noted that the Board had "attempted" to deal with the Court's objections as stated in its first Opinion (A. 6), and characterized the Board's confrontation with the Court on the issue of the policy behind Section 408(b) as involving but a

> "nuance of difference between the Board's views and those intimated in our previous opinion" (A. 10).

The record, however, speaks for itself.

The Court's action allowing the Board to reject Congressional policy was thus clearly error. It was also highly prejudicial to petitioners.

First, the Board's erroneous view of what the Congressional policy is, undoubtedly colored its findings and helped to render them deficient. See Point IV, *infra*.

Second, we do not believe the Board could have reached the result that it did if it had applied the appropriate standards. The Board had before it the largest carriers (p. 12, n. 12, *supra*) from by far the most competitive mode of transportation for air freight (p. 6, *supra*). Under the circumstances, *if there was any policy against surface entry at all, the Court could not very well have allowed the Board to admit these particular applicants,* much less have provided for the entry of a substantial number of other long-haul motor carriers, as it did. Indeed, considering the nature of the competition between the applicants and petitioners, to have done so would have been consistent only with the Board's statement that absolutely no such Congressional policy against surface carrier participation existed.

It is not at all surprising, therefore, that the Board apparently felt constrained to confront the Court on this issue. But for the reasons shown above, it was and is beyond the power of the Board to alter Congressional policy in this important area of commerce. What is surprising, and gross prejudicial error, is for the Court in its second Opinion to ignore its interpretation of the statute given to the Board in the Court's first Opinion, and to permit the Board to reject the Court's own correct interpretation of the statute.

III. The Decision Below Would Foster A Means Of Circumventing The Review Provisions Of The Administrative Procedure Act And Review Statutes.

The Board has formulated a procedure designed effectively to prevent review by the Courts of the impact of its actual decision in this case, and the Court of Appeals has given its blessing. The procedure, while ingenious, results in a denial of petitioners' rights under the applicable review statutes.

The Court of Appeals was greatly troubled when it first reviewed this case over the probable impact of the Board's unlimited entry policy on the existing independent air freight forwarders (391 F.2d at 298). Recognizing that the independent forwarders *must* be preserved as a viable competitive force (*id.*, at 300), the Court expressly required the Board to articulate its entry policy and assess its impact in terms of numbers of probable entrants (*id.*, at 300) and resultant competitive impact (*id.*, at 298).

On remand, the Board, as noted previously, reached the same conclusion with respect to the same applicants before it, but this time, as to all future applicants, professed to withhold judgment and to adopt a policy of "monitored" entry (A. 18). It gave form to its latter pronouncement by promulgating "proposed" regulations governing future entry (A. 68). The criteria for admission were to be *exactly the same*, however, as those applied to the members of the class already admitted. Indeed, the Board expressly stated that it would apply the "*same criteria*" to future entrants as were applied to the applicants before it (A. 44), and further noted its rules were being "*codified*" in the "proposed regulations" (A. 18). It is noteworthy that the "proposed" regulations have now been made final. As

promised by the Board, there was *no* change whatsoever in the criteria for future admission. *Compare* "proposed" Sections 296.86 and 297.66 at A. 79 and 84 *with* their "final" counterparts at 34 Fed. Reg. 19342 and 19343.

The Court of Appeals nevertheless *this time* affirmed the Board. In so doing, it avoided the impact issue, its justification being that the Board had only issued proposed regulations, review of which would be "premature" (A. 12). The Court said that petitioners were required to "await further grants pursuant to the regulations by which petitioners might be aggrieved" (*ibid.*).

The Court's rationale for avoiding the impact issue will not stand scrutiny. Prematurity, or conversely reviewability, is a function of the practical effect of the decision below, not of form. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416-17 (1941).

It is clear that the Board both in its original Order and in Order 69-4-100 did, in fact, formulate *final* rules for entry of long-haul motor carriers as a class into air freight forwarding. Merely labeling its rules as "proposed" does not make them any less reviewable, particularly in view of the Board's stated intention to apply already formulated criteria to future applicants (A. 44). Nor were the rules any less effective because made on an evidentiary record in an adjudicatory proceeding. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203, *reh. denied*, 332 U.S. 783 (1947).[17] Opinions accompanying adjudicatory proceedings "may have essentially the same effect as rules." 1 Davis, *Administrative Law Treatise* 297 (1958).

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[17] Indeed, the Board's manner of proceeding was eminently sound, since the rules announced in this case bear upon economic enterprise and touch upon the financial aspects of great numbers of businesses affected (see Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc.

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It is also clear that the practical effect of the Board's rules thus formulated is prejudicial to petitioners' rights.

First, as matters now stand, petitioners will be required to review the orders of the Board admitting applicants under its regulations *seriatim*. This obviously places an impossible burden on petitioners, as well as the Courts, in that it will either require petitioners to prosecute multiple appeals as a means of anticipating the precise moment the Board's entry policy becomes illegal due to its cumulative impact or, if petitioners are to attempt to estimate the single precise moment when the invasion becomes unbearable (assuming it has not already been reached), it will place an undue risk of irreparable injury on petitioners which could arise from having waited a moment too long.

Second, the matter is clearly ripe for review because petitioners will be irreparably harmed by a large scale invasion of motor carriers into their midst if review is not obtained (see p. 12, n. 12, *supra*). As will be demonstrated in Part IV, *infra*, while the agency has purported to substitute experimentation for the findings required under Section 8(b) of the Administrative Procedure Act, this so-called experiment is in reality uncontrolled, since its impact will be ascertainable only on an after-the-fact basis by reason of data *to be* reported by an *unspecified* number of successful applicants. It is uncontrollable for the further reason that the legal means to terminate or reduce the experiment are lacking (p. 23, *infra*).

In short, petitioners are exposed to serious risks unless it obtains review now. Petitioners are not faced with a mere modification of rights under their present

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(Footnote 17 continued)

No. 8, 77th Cong., 1st Sess., 107-08 (1941)), and the proceeding also involves sharply conflicting factual issues (S. Rep. No. 752, 79th Cong., 1st Sess., 18 (1945)). In any event, having made rules in this manner, the Court cannot allow the Board to run away from the record.

licenses. Petitioners, instead, have been plunged into a highly unstable environment featuring a massive invasion of newly-licensed competitors which is already well under way.[18]

Certainly, there is no administrative purpose to be served by waiting. The record, upon which the regulations were promulgated and their impact can be assessed, is the record before us. There has been full opportunity to make necessary findings on the impact issue (indeed, the Court directed the Board to do so (391 F.2d at 300)).

Accordingly, the *Court's* finding that "[p]etitioners will be affected by the regulations only when, as and if the Board grants further authorizations to long-haul truckers under them" (A. 12), and the *Board's* findings, which were limited solely to the impact of the three applicants before it (A. 17), are clearly inadequate. By thus ignoring the real impact of the regulations, the Court has effectively deprived petitioners of their right of review, and has invited other agencies to defeat review in the same manner.

IV. The Decision Below Would Undermine Section 8(b) Of The Administrative Procedure Act By Allowing Agencies To Substitute "Experimentation" For The Requisite Findings Under The Act.

While the Board struggled on remand to patch up its findings in a few of the numerous respects earlier found

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[18] We again call this Court's attention to the Board's stated intention to license future applicants on the same basis as the instant ones (A. 44), a factor clearly to be given great weight in deciding the question of reviewability. *Columbia Broadcasting System v. United States, supra,* 316 U.S. at 422.

deficient, it failed a second time. Indeed, many of the major defects found by the Court the Board ignored the second time around, satisfying itself with lengthening rather than supporting its decision. Perhaps realizing the difficulty in supporting its decision with findings on this record, it resorted to the expedient of justifying all in the name of "experimentation." Such action, if approved, could completely pervert Section 8(b) of the Administrative Procedure Act.

In *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), this Court stated:

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limitations on its discretion." (371 U.S. at 167.)

The foregoing statement applies with equal force to experimentation.

We do not believe any experimentation is permissible in this case, in view of the clear Congressional policy against surface carrier entry into air freight forwarding (Section II, *supra*) and the danger which a reversal of such policy entails (391 F.2d at 307). But even if those factors were not present, what was done here is not proper experimentation.

1. Proper experimentation in this case would require an estimate of the number of participants and the impact if the experiment goes wrong (391 F.2d at 300). Here, the Board quite clearly did not make such an estimate and therefore has no idea what the limits of its "experiment" are.

2. The Court has apparently adopted the Board's contention in support of its experiment that control can be maintained by instantly revoking the licenses issued to participants. However, the operating authorization of an air freight forwarder is a license within the meaning of Section 2(e) of the Administrative Procedure Act, 5 U.S.C. §558(c), see *Airfreight Forwarder Investigation*, 21 C.A.B. 536, 609 (1955), notwithstanding the fact that such license may be obtained initially without hearing. It is also clear that the Board could not simply cancel the authorizations here at issue without a lengthy and protracted hearing measured in years. In *Re Carter*, 177 F.2d 75 (D. C. Cir.), *cert. denied, sub nom., Laws v. Carter*, 338 U.S. 900 (1949); *Air Freight Forwarder Investigation, supra*. In the meantime, given the precarious posture of the existing independent air freight forwarding industry (391 F.2d at 299), irreparable injury would have been done.

What forced the Board into this posture of experimentation is clear. It could not reach the decision it apparently wanted to reach on the basis of policy on the record before it. Following are a selected sample of key findings which illustrate the strain that the Board must have been under. We do not ask the Court to determine the substantiality of the evidence on all substantive issues in this case at this juncture. Instead, we present these examples merely to shed light on the Board's action, which the Court sanctioned, whereby it (1) refused to apply the applicable Congressional policy to this case (Point II, *supra*), (2) resorted to artful devices to avoid judicial review of the issue of competitive impact

(Point III, *supra*), and (3) substituted "experimentation" for findings, reasons and evidence required by Section 8(b) of the Administrative Procedure Act.

1. The Court affirmed an ultimate finding that applicant's services are needed because the air freight industry is plagued by an overabundance of unused capacity. The specific finding was that less than 25% of the available capacity for freight was being utilized (A. 25). The 25% figure is either absurd or, if it is accurate, such waste of resources does not speak well of both the regulators and the regulated.

Fortunately, it is the former which is true. The evidence relied on appears at J.A.(R.) 2204-05.

The Board's load factor finding is patently absurd because the 25% figure is a *weight* load factor. However, the capacity of freight services, particularly that available on passenger aircraft, is limited by *volume*. No meaningful estimate of unused capacity can be made, therefore, without determining what portion of available *space* goes out empty.[19] This the Board did not do. It should also be noted that the practical capacity

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[19] The space problem is particularly acute for freight carried in the odd shaped belly compartments of passenger aircraft. In passenger services, there is very little space left after allowing for the space needed for passengers above deck, the space needed for passenger baggage and mail below deck and the plumbing and other fixtures which intrude into the belly compartment of an airplane, none of which factors the Board took into consideration. Were it not for the Board's expertise, this might appear to be a classic case where one look at the average loaded passenger aircraft and the available freight, which weighs at most 10 pounds per cubic foot on the average, is worth thousands of pages or record, and where, in view of the Board's finding, the regulators might well be accused of regulating from an ivory tower.

of any given airline operation – whether passenger or freight, or whether based on weight or space – is considerably less than 100%. Because of the uneven flows of traffic and the volume limitations on capacity, any carrier that consistently runs without substantial amounts of so-called "unused" capacity measured by weight is not providing enough capacity. There thus has been not only no colorable attempt to make a finding as to the amount of unused capacity in the industry, but the circumstances are such, given the Board's expertise, as to call into question the *objectivity* of the Board *in this entire case.*

2. The Court affirmed the Board's finding that the long-haul motor carriers will promote traffic in the outlying, secondary air freight markets. The evidence relied on, however, was simply data showing that most existing air freight forwarder traffic is generated in a relatively small number of top markets (A. 28), and that air freight forwarding "may not be directly profitable" at the outlying points (*ibid.*). There is absolutely no indication that operations *at such points* would be any more profitable and, hence, any more productive of traffic for the motor carrier forwarders (*ibid.*). What is indicated is that the truckers would do everything possible to protect their substantial investments by using their trucking facilities there and elsewhere (see p. 11, *supra*). Moreover, the Board has found in other cases before it that there is in fact no undeveloped air freight potential at the outlying markets. See *Domestic Coterminal Points-Europe All-Cargo Service Investigation,* Order E-25513, August 9, 1967, C.A.B. Docket No. 18531, pp. 2-3 (mimeo.).

3. The Court after remand did not require a finding as to whether long-haul motor carriers would suffer disabling conflicts of interest as between their air and surface operations (the Board merely concluded, after

believing for twenty years to the contrary, that any suggestion of conflicts was nothing more than "hypothesis") (A. 35). Based on a review of the record, Judge Friendly had earlier found the Board's original findings of no conflicts to be "at war with common sense" and to suffer from a "certain unreality" and "serious confusion of thought" (391 F.2d at 304) and, indeed, he further found that it would be a "formidable" task to find no conflicts on remand on this record (*id.*, at 303). *Thus*, it is explained why there is now *no* finding on this very crucial issue.

4. The Court affirmed an Order and Opinion in which the major findings are in conflict. On the one hand, the Board found that the long-haul motor carriers would have no conflicts of interest because they would gladly divert shipments of up to 200 pounds from their surface operations to a more profitable air freight forwarder operation (A. 34). On the other hand, the dominant public interest justification for the decision below was that applicants' services were needed at the *outlying secondary points*, where traffic is allegedly not being promoted (A. 28). The evidence relied on undisputedly indicates, however, that air freight forwarding is more profitable than long-haul motor carriage only in the case of a relatively few forwarders (J.A.(R.) 4466), who admittedly concentrate most of their services at the *major points* (A. 28) where profitable consolidations can be effected (*ibid.*). It is undisputed that the *long-haul* truckers provide *no short-haul* service today. *Missing* is *any* finding that would reconcile these contradictory findings by showing how the applicants would get their small shipments from the secondary points to the major points where the profits are but where there is already a plethora of service and, hence, *no* justification for their operations.

CONCLUSION

For the foregoing reasons, the writ of certiorari should issue.

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